IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,
Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, INTERVENOR, AND THE STATE OF NEBRASKA, INTERVENOR,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

REPLY BRIEF OF PETITIONERS

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

JAMES L. KOLEY
STEPHEN T. MCGILL
MCGILL, KOLEY & PARSONAGE, P.C.
Suite 300
10010 Regency Circle
Omaha, Nebraska 68114

Attorneys for Petitioners

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REPLY BRIEF OF PETITIONERS

It is important to note at the outset the concession of the State of Nebraska (Neb. Brief at 15 n.6; see also 41) that each of the cases cited by it in support of the entry of a prior restraint involved unprotected speech, in contradistinction to the "concededly protected speech" involved in this case. Thus, as we originally pointed out, prior restraints on news re-

porting in areas of "protected" speech have never been deemed constituitonal, except in the extremely limited national security area noted in our main brief (pp. 46-47). We start from the premise, therefore, that it is Respondents, not Petitioners, who are here seeking a radical departure from past law.[1]

1. There is at least one common thread running through all three of the Respondents' briefs. They first assume that most of the prospective jurors from the immediate vicinity would have seen or heard something in the media about the Simants case in advance of trial—not an unfair assumption in view of the size of the community and the fright caused by the crime. However, Respondents then proceed to assume further that (a) having once seen or heard about the case, prospective jurors would be unable to render a constitutionally fair and impartial verdict, and (b) it would not be possible on voir dire to determine which veniremen had made up their minds about guilt in advance, as opposed to those who could put preconceived notions behind them and render

[1] Our position in this respect has been bolstered by the publication of yet another study of the fair trial—free press issue which concludes, as did its predecessors discussed in our main brief, that: (1) "The Task Force strongly opposes court orders that directly forbid the press to publish or broadcast information about a criminal case during the pre-trial period, nor does the Task Force approve of excluding the press from pre-trial proceedings in order to prevent pre-trial publicity," and (2) "The Task Force believes that an order attempting to prevent the publication during a trial of any information obtained by the press is unconstitutional, representing censorship of precisely the kind that the First Amendment has decided to prohibit." *Rights in Conflict*, Report of the 20th Century Fund Task Force on Justice, Publicity, and The First Amendment, 10, 15, and 16 (1976).

a verdict on the evidence at trial.[2] Not only are these assumptions unwarranted on this record or in law generally, but they are specifically prohibited in a number of states, including Nebraska.

Thus, Nebraska has a statute of long standing which provides in relevant part:

> 29-2006. The following shall be good causes for challenge to any person called as a juror, or alternate juror, on the trial of any indictment: * * * Second. That he has formed or expressed an opinion as to the guilt or innocence of the accused; Provided, *if a juror*, or alternate juror, *shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine*, on oath, such juror, or alternate juror, as to the ground of such opinion; and *if it shall appear to have been founded upon reading newspaper state-*

[2] *E.g.*, "It is submitted as indisputable that pre-trial publicity, in certain cases, can irreparably damage a criminal defendant's conceded right to a fair trial" (Neb. Brief at 9); the order was entered "at a time when there was no other way to protect prospective jurors from information which they could not fairly be expected to ignore. Without this, there could be no impartial jury • • •" (*id.* at 19; footnote deleted); jurors "are, no doubt, influenced by the publicity they are subjected to" (*id.* at 26), "[i]nstructions cannot remove prejudice once it has been engrained in the mind of the potential juror. Such instructions are only effective if given to a jury which was not seated with an established predisposition toward guilt or innocence" (*id.* at 32); continuances are questionably effective "where the entire population of a small community is acutely aware of the relevant facts and the position of the accused in relation to those facts" (Stuart Brief at 19); the press normally prints "various personal sketches both of the defendant and of the victim or victims, of the principals to the trial, of the defendant's family and the victim's family, all of which can be prejudicial to the defendant and all of which could tend to create an atmosphere impairing the selection of an impartial jury" (Simants Brief at 9).

> *ments,* communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify *and the juror,* or alternate juror, *shall say on oath that he feels able notwithstanding such opinion to render an impartial verdict* upon the law and the evidence, *the court, if satisfied that said juror,* or alternate juror, *is impartial,* and will render such verdict, *may in its discretion admit such juror,* or alternate juror, as competent to serve in such case. [Sec. 29-2006, R.R.S. 1943; emphasis added.]

This statute has been interpreted in a line of cases stretching back almost 100 years to mean that a venireman is not automatically disqualified because he has read newspaper reports about the crime. Even opinions about guilt or innocence from reading or hearing about a case do not act to automatically disqualify. Such veniremen are only disqualified when their source of news is witnesses themselves or their testimony, or when the court is not satisfied, after full examination, that the veniremen can render an impartial verdict.[3]

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[3] *E.g., Curry* v. *State,* 5 Neb. 412 (1877); *Bohanan* v. *State,* 18 Neb. 57, 24 N.W. 390 (1885); *Basye* v. *State,* 45 Neb. 277, 63 N.W. 811 (1895); *Rottman* v. *State,* 63 Neb. 648, 88 N.W. 857 (1902); *Ringer* v. *State,* 114 Neb. 404, 207 N.W. 682 (1926); *Kitts* v. *State,* 153 Neb. 784, 46 N.W.2d 158 (1951); *Sundahl* v. *State,* 154 Neb. 550, 48 N.W.2d 269 (1951); *Fugate* v. *State,* 169 Neb. 420, 99 N.W.2d 868 (1959). See also *State* v. *Bautista,* 193 Neb. 476, —— N.W.2d —— (Neb. April 10, 1975).

For example, in *Fisher* v. *State,* 154 Neb. 166, 47 N.W.2d 349 (1951), the defendant was convicted of killing her son by whipping him to death with a ruler and a stick. The case was publicized extensively in the North Platte area of Nebraska before trial. One newspaper quoted the County Attorney as saying the coroner's jury found the boy's death "hastened by malnutrition" and the result of a "most inhuman beating administered by his mother." 154 Neb. at 168, 47 N.W.2d at 352. Yet the defendant failed to gain reversal because:

> The claim of error is predicated on the assumption that the jurors read the matters published and were influenced, prejudiced, and disqualified thereby. This assignment is wholly unsupported. Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist. Sec. 29-2006, R.R.S. 1943 • • •. [154 Neb. at 169, 47 N.W.2d at 352.]

Nor is the Nebraska Statute unique. A number of states provide that information received by veniremen by way of newspaper accounts or other hearsay does not automatically disqualify them. The California Penal Code is representative:

> * * * In a challenge for actual bias, * * * no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; *provided,* it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. [California Penal Code § 1076.]

See also North Dakota, § 29-17-38; Oklahoma, 22 § 662; South Dakota, § 23-43-35; Utah, § 77-30-21; Washington, § 4.44.190.

Some states have separate provisions that specifically deal with the problem of information received by way of newspaper reports. For example:

> It shall be no cause of challenge to a juror that he may have obtained information of the

> matters at issue through newspapers or public journals, if he shall have received no bias or prejudice thereby * * *. [Wisconsin, § 270.17.]
>
> * * *
>
> In the trial of criminal cases it shall not be cause for challenge that a person called to act as a juror has formed or expressed an opinion as to the guilt or innocence of the accused from newspaper reports and rumor, or from either of them, if such a person swear that he can impartially try the case according to the law and evidence notwithstanding such opinion. [Wyoming, § 7-225.]

To the same effect, see Indiana C. Crim. Proc., § 35-1-30-4; Illinois, 78 § 14; Texas, C. Crim. Pro. Art. 35.16; Massachusetts, 234 § 28; Virginia, Rule 3a: 20.

Thus, voir dire becomes an impressive tool in the arsenal used by judges and litigants to guarantee a fair trial, because it is at voir dire that those veniremen who are truly biased are distinguished from those who may have heard about the case but remain open-minded. See *Silverthorne* v. *United States*, 400 F.2d 627, 635-640 (9th Cir. 1968); Babcock, "Voir Dire: Preserving Its 'Wonderful Power'," 27 Stan. L. Rev. 545, 548-549 (1975).

Simants seems to recognize that voir dire can be effective (Simants Brief at 11-12), and he concedes that little empirical data is available to prove the effect of publicity upon proposed jurors (*id.* at 13-14).[4] However, the briefs of both Nebraska and Judge Stuart reveal a notable lack of regard for voir dire

[4] This should be contrasted with Judge Stuart's assertion that empirical studies have "scientifically established" the effect of pretrial publicity on jurors. Stuart's Brief at 10.

and its ability to winnow out veniremen who are lacking in fairness and impartiality. The State's only reference to voir dire is the single statement, without citation or explanation:

> The use of voir dire examination to detect the existence of prejudice arising from extensive publicity and thus ensure avoidance of prejudice to criminal defendants has inherent limitations. [Neb. Brief at 33.]

Judge Stuart discusses voir dire largely on the basis of cases that either are distinguishable[5] or support our position. Judge Stuart's reliance on *United States* v. *Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974), is certainly inexplicable, because that case held, despite what may have been the most pervasive pretrial publicity in recent history, that one of the chief participants in Watergate received a fair trial, and the court specifically approved as effective a general voir dire examination by the trial court followed by individual questioning of the veniremen who had been exposed to pretrial publicity.[6] And Judge Stuart's citation to

[5] Thus, *Groppi* v. *Wisconsin*, 400 U.S. 505, 510 (1971), noted that challenges to the venire were not *always* adequate, but the court was making the point that a change of venue was sometimes necessary, and a statutory prohibition against a change of venue violated a defendant's constitutional rights. *Irvin* v. *Dowd*, 366 U.S. 717, 727-728 (1961), was a case where the voir dire *demonstrated* the clear bias and prejudice of the jury that was allowed to sit, in contrast to a proper use of voir dire to keep such persons off the jury. *Sheppard* v. *Maxwell*, 384 U.S. 333, 354 n.9 (1966), suggested that a combination of voir dire plus a short continuance would have alleviated many problems at the outset of that trial.

[6] See also *Ristaino* v. *Ross*, 44 U.S.L.W. 4305, 4308 (U.S. March 3, 1976); *United States* v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *Margoles* v. *United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

State v. *Van Duyne*, 43 N.J. 369, 204 A.2d 841 (N.J. 1964), is also an odd one, because that case specifically held that even in a capital case where jurors had read about what amounted to a confession, the trial court was free to satisfy itself through extensive voir dire that the prospective jurors had the requisite constitutional impartiality and could sit on the jury.

Only one of Respondents' briefs makes even a passing reference to the recently-decided *Murphy* v. *Florida*, 421 U.S. 794 (1975). Yet this case made clear that *Estes* v. *Texas*, 381 U.S. 532 (1965), *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), and *Sheppard* v. *Maxwell*, *supra*—cases frequently cited by Respondents[7]—"cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprive the defendant" or his right to trial by an impartial jury. 421 U.S. at 729.

[7] The length to which the State has gone in an attempt to analogize this case with prior case law is shown by its reliance on *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Neb. Brief at 17. The deprivation of the right of a witness to speak in court is facially distinguishable from the right of the press to speak at all. Again, neither *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367 (1969), nor *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1972), both cited in the State's brief (p. 18), is a prior restraint case. And in *Buckley* v. *Valeo*, 44 U.S.L.W. 4127 (U.S. January 30, 1976), the Court held that those challenged portions of the Federal Election Campaign Act of 1974 (not 1971) that were held constitutional only passed muster because they were not aimed at the press. Here, the very purpose of the restraint is to suppress speech and press privilege. Finally, the assumption (Neb. Brief at 34)—and it is only that—that decisions relating to contempt may be used to support the adoption of a clear and present danger test in prior restraint cases is totally unsupported by any prior restraint case in American history.

Thus, the argument in support of a prior restraint that certain publicity "can prevent the impaneling of a constitutionally acceptable jury" (Neb. Brief at 9) is simply contrary to law and history: no jury has ever been held constitutionally unacceptable because of the failure of a court to enter a prior restraint. Instead, the relevant cases, the statutes noted above, and actual experience all establish that:

1. Pretrial publicity, even when pervasive, is not necessarily read, heard or seen by all members of the community which is theoretically "covered" by the media.

2. Many of those who do read, hear or see the publicity do not absorb or retain it.

3. Even those who retain or absorb the publicity are normally perfectly capable, upon proper instruction, of rendering a fair and impartial verdict based entirely upon the evidence at trial.

4. As to those who are not able to render such a fair and impartial verdict, the voir dire, properly conducted on both a general and individualized basis, is fully capable of discovering and removing them from the panel. Even in the extraordinary case,[8] voir

[8] Nebraska has completely misunderstood (Neb. Brief at 29) the reference in our main brief (p. 30) to the "most exceptional case." Rather, as the context clearly shows, Petitioners were making the point that carefully selected jurors who had read about the case could nevertheless exercise their independent judgment except in the most extraordinary case, in which event other means such as continuances, change of venue and the like should be used to insure a fair jury.

dire coupled with a continuance[9] or a change of venue[10] will prevent injury.

Under these circumstances, the idea that vital First Amendment freedoms must be sacrificed because publicity "might" in some way "make difficult the impaneling of an impartial jury * * *"[11] is completely repulsive to our constitutional system. Even in contempt cases, this Court has made clear that neither an "inherent tendency" nor a "reasonable tendency" to interfere with the orderly administration of justice is sufficient to justify a restriction on the press. *Bridges* v. *California*, 314 U.S. 252, 273 (1941). Surely the extreme of a prior restraint on the publication of information revealed in public court proceedings, in public court records, and from other sources about pending judicial proceedings cannot be imposed on the basis of possible contingencies, particularly where

[9] Respondents point to the Nebraska statutory requirement that criminal trials be held within six months of arrest. The subject statute, however, is so riddled with exceptions that it can hardly be said to set forth a requirement at all. Neb. Stat. 29-1207, R.S. Supp. 1974.

[10] Respondents seem to give some weight to the Nebraska statute that limits any change of venue to the immediately surrounding counties. Both *Groppi* v. *Wisconsin*, *supra*, and *Irvin* v. *Dowd*, *supra*, 366 U.S. at 720-721, would appear to throw serious doubt upon the constitutionality of that statute. However, we need not press the point for two reasons. First, a state may not use restrictive devices such as a limit on venue to cut off First Amendment rights, and secondly, there were obviously fair and unbiased jurors aplenty among the more than 52,000 inhabitants of the counties surrounding Lincoln County, where the crime occurred.

[11] Stuart Brief at 36, 40. All three briefs of Respondents describe the alleged harmful effects of publicity in this case as "possible," "probable," "potential" or "inherent," with a "high probability of injury," and repeatedly the harmful effects are hedged in terms of what "could" happen, or "can" happen, or "might" happen, or "may" happen. Neb. Brief at 24, 25, 41; Stuart Brief at 42, 43; Simants Brief at 9, 23, 29.

alternative methods of dealing with real problems are present when and if they occur.

If any proof were needed as to the highly speculative nature of assuming bias and prejudice in advance of trial, it is provided by Respondents themselves when they attempt to articulate just what such an assumption need be based upon. For example, Nebraska, apparently in recognition of the hazy state of this record as to just why a prior restraint was necessary, concludes that "* * * the trial judge is not limited in making his determination to the introduction of evidence that shows the existence of a 'clear and present danger' but may consider other indices of which he is aware." Neb. Brief at 40. Under this theory, the trial judge could consider anything he pleased, inside or outside the record, in order to reach some entirely conclusory finding that would restrain publication.

And the State goes on:

> Of necessity, the record contains language couched in speculation. No one can determine to a certainty the potential impact of actual pretrial publicity. However, when pre-trial publicity creates a high probability of injury to Sixth Amendment rights a restrictive order is warranted. [*Id.* at 41 n.25.]

In his Brief, Judge Stuart argues that even though information "is available to the public," it should not be *disseminated* to the public because of its possible adverse impact. Stuart Brief at 33. He then notes that "* * * honest and factual reporting by sincere and responsible news services can similarly, though unintendedly, cause identical results [as sensational and bizzare reporting], thus frustrating the criminal process." *Id.* at 41. After attempting to distinguish between cases involving "allegations of public corruption" from

those involving crimes of "a private citizen" (*id.* at 37)—an endeavor that we can hardly envisage the federal and state courts entering upon—Judge Stuart concludes that, "* * * based on the unique circumstances presented by the record, the nature of the crime, and the community setting surrounding the prosecution, there is no question but that unrestricted pretrial publicity presented an obvious threat to the integrity of the trial." *Id.* at 43. Just what "unique circumstances" are presented by this record is unclear, and how "the community setting surrounding the prosecution" could justify a prior restraint is unexplained.

As for Simants, he takes the extraordinary position that:

> [e]ven without evidence before it [it] would appear from Sheppard v. Maxwell, supra, that the court has a duty to take action once it has been brought to its attention that adverse publicity might, in fact, impair the right of the defendant to secure a fair trial. [Simants Brief at 23.]

Here again, the theme reappears that based not upon evidence and findings but upon the mere possibility of adverse publicity, a trial judge can take a step directly limiting press coverage of court proceedings, never before approved by this Court. We emphasize these quoted portions of Respondents' briefs not to show how weak this record is but rather to demonstrate that in *all* prior restraint cases the courts are entering orders on the basis of speculation, theory and surmise. Respondents here cannot adequately articulate what could possibly justify the drastic departure from First Amendment guarantees represented by the Nebraska prior restraint orders because such justification does not exist. With unsupported claims of vague "unique circumstances," "community setting," and "nature

of the crime" used as legal standards, there would be virtually no limit on the judicial power to issue prior restraints. These broad and expandable criteria would soon smother the press exercise of its First Amendment rights, all to the detriment of the public. Just as importantly, even if adverse pretrial publicity could somehow be quantified, assessed and proven, we have shown both in our main brief and in this one that adequate measures are available to the courts to prevent injury at trial.

2. Judge Stuart is simply wrong in asserting that *United States* v. *Schiavo*, 504 F.2d 1 (3d Cir. 1974), and *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), held that a prior restraint is permissible "if some type of notice of hearing preceded the order." Stuart Brief at 29. In fact, *Schiavo* did not decide the issue as to whether such restraints are permissible,[12] and *Dickinson*, insofar as reporting on the open court proceedings involved in that case was concerned, held that no censorship or prior restraint whatever was permissible.[13] Again at page 35 of his brief, Judge Stuart misapprehends the *Dickinson* ruling. That case was not restricted to the publication of information about corrupt officials. As noted above, its ruling re-

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[12] The *Schiavo* court specifically stated: "Our conclusion that this case should be reversed on procedural grounds makes resolution of the constitutional issue unnecessary." 504 F.2d at 6.

[13] The Fifth Circuit said: "Censorship in any form—judicial censorship included—is simply incompatible with the dictates of the constitution and the concept of a free press. * * * [N]o decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court." 465 F.2d at 506-507; footnotes deleted.

lated to any type of court proceeding involving any type of subject matter.

3. Both the State of Nebraska and Judge Stuart rely heavily in their briefs[14] upon an informal, post-trial questioning of jurors apparently undertaken by the trial judge. The questions and answers relied upon should be completely ignored by the Court for each of three distinct reasons:

(a) They are not a part of the record.[15]

(b) Even if they were part of the record, the questions posed to the jurors are so leading or confusing that the answers elicited are meaningless. The first question was not quoted in either brief but appears to have asked whether the jurors could have been fair and impartial if they had heard, as the State puts it, "that the defendant confessed to his father and mother, his nephew, the State Patrol investigator and the Sheriff." Neb. Brief at 8. A question so phrased would clearly indicate the answer the judge was seeking. The second question, as quoted by the State, asked the jurors, "how many of you could not have acted as jurors in the case" if they had heard about "the confessions" before trial. The nine jurors who raised

[14] Neb. Brief at 7-8, 26-27; Stuart Brief at 50-51.

[15] In our Brief, Petitioners brought the Court up to date on certain matters occurring in the case after the grant of certiorari (pp. 18-21). We were careful to point out, however, that we were doing so "for informational purposes only" (p. 18); we in no way relied upon such matters as grounds for decision in the case. Respondents, on the other hand, are substantively relying upon matters wholly outside the record in support of an affirmance of the judgment below.

We would point out in addition that most of the facts stated on pages 3 through 6 of the State's Brief are *de hors* the record, and many of them are simply inaccurate.

their hands may well have felt that such knowledge would have legally disqualified them from acting as jurors. The third and fourth questions asked how many jurors "would have been able to take an oath" that they could be fair and impartial if they had read "the text of the confession" before trial. This question was entirely unfair, since the jurors might well have felt perfectly able to be fair and impartial and yet not have wanted for a variety of reasons to take an oath on it.

(c) There was no opportunity for counsel to test or probe these answers; they were elicited solely by the court. This is particularly important because, as noted, the tenor and cast of the questions revealed the answers the judge was seeking.[16]

If the Court intends to rely in any way upon these questions and answers, then Petitioners respectfully request leave of Court to file the results of a subsequent poll of the jurors conducted by the North Platte Telegraph which completely refute the notion that the jury felt it would have been prejudiced in its ability to decide the case impartially because of items in the media in advance of trial.

4. The State refers to the order in this case as a "momentary and narrow restriction" (State Brief at 22), as one "narrowly and momentarily" circumscribing the reporting of news (*id.* at 13), as a "limited restrictive order" (*id.* at 32), and as one entered "for

[16] We find it curious that the State and Judge Stuart rely so heavily upon the jurors' answers to the judge's informal questions at the conclusion of this case and yet both Respondents totally discount the value of jurors' answers to a more formal and detailed voir dire procedure at the outset of trials in general. Neb. Brief at 32; Stuart Brief at 22-24.

a relatively short period of time and * * * narrow and limited in scope" (*id.* at 39). Judge Stuart similarly refers to "a temporary delay" in publicity. Stuart Brief at 5. We would point out that the prior restraints in this case first went into effect on October 22, 1975, and remained in effect in one form or another until the jury was finally selected on January 7, 1976—a period of 11 weeks.[17] This was a constitutionally impermissible period under any conceivable standard.

As to the "narrow" nature of the order appealed from, it prohibited the revelation not only of confessions and "admissions against interest" but of "[o]ther information strongly implicative of the accused as the perpetrator of the slayings." Cert A 63a-64a. As we have previously pointed out, this language is so broad and so vague that it could encompass Simants' arrest, the fact that a complaint was filed against him, his retaining a criminal lawyer, his plea of not guilty by reason of insanity, and an entire range of other, purely factual and accurate information. The breadth of the order is in line with the conclusion of the State's brief, because after repeated language in that brief about using prior restraints when all else fails, the final articulation states (Neb. Brief at 41): "when pretrial publicity creates a high probability of

[17] Nor is such a delay unusual. As pointed out by one of the Amici, it took 40 days to have the following, obviously unconstitutional order stayed by an appellate court:

> IT IS THEREFORE ORDERED AND DECREED that no person, firm, or corporation shall in any manner, by radio, newspaper, television, or otherwise, publicize, report or distribute any information whatsoever concerning the evidence, witnesses, trial or proceedings in this cause without a specific order authorizing said reporting or publication from the Court. [*North Carolina v. Purdie*, Nos. 75 CR 9298, 9299 (Gen. Ct. of Justice, Super. Ct. Div., Columbus County, N.C., Jan. 5, 1976).]

injury to Sixth Amendment rights, a restrictive order is warranted."

5. Simants makes an important point in his brief when he states (p. 10) that in Sutherland, where the crime occurred, the population is only about 800, that news is rapidly disseminated by word of mouth, and that information "is more rapidly and readily conveyed by word of mouth and gossip than it would be in a large metropolitan area or populous area." This was precisely the point that an attorney for the media was making in a sentence referred to in two of Respondents' briefs (Stuart Brief at 40; Neb. Brief at 35). He was not saying, as these reference imply, that media publicity had already made it impossible for Simants to receive a fair trial but rather that gossip and word of mouth communication had already transmitted virtually all relevant information to everyone in the community. The point is important because rumors and gossip can transmit an astonishing amount of misinformation—misinformation that can be far more damaging to a defendant than accurate news reporting. Friendly and Goldfarb, *Crime and Publicity* 79 (1967); Allport and Postman, *The Psychology of Rumor* 15 (1947). And as we noted in our main brief (pp. 59-60 n.48), such rumors and gossip tend to increase and flourish when news is cut off from the people. Thus, Simants' point supports, rather than undercuts, the value of free and open reporting of news rather than a restraint on its publication.

6. It is simply not true, as Respondents imply, particularly by comparisons between this case and *Sheppard*, that the news coverage here was excessive, erroneous or sensational. Even the Nebraska Supreme Court conceded (Cert A 62a) that the press in this case fol-

lowed the voluntary "Nebraska Bar—Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation," which appear at Cert A 4a. As the Exhibits in the Joint Appendix indicate (and these can be supplemented in the record by many other newspaper and magazine articles if the Court so wishes), the facts of the Simants story were moved off the front pages in the out-of-town papers after the initial two or three days of intense press and public interest, and the story would have remained routine if it had not been for the prior restraint orders. The local newspaper, the North Platte Telegraph, naturally gave the story more attention than the press from further away, but after the second day the Telegraph gave far more attention to the maneuvering over the prior restraint orders than to the crime itself. To the extent that this case has received publicity "exceeding the normal bounds of reporting" (Simants Brief at 18), it is almost entirely due to the prior restraint orders now before the Court. Thus, in a very real sense, much of the publicity was caused by acts of the judiciary rather than by the nature of the crime.

7. In conclusion, we would emphasize that Respondents, despite their assurances to the contrary, do not seek an accommodation between fair trial and free press rights. An "accommodation" has in fact been in existence for 200 years. While the impact of the media has obviously increased in recent years, so have the rights of defendants, which have been protected by ever more procedural and substantive safeguards. So, as well, has the willingness of the media to abide by voluntary guidelines such as those in existence in Nebraska. What the rule of law sought by the Respondents really would effect is not an accommodation but virtually an automatic elimination of free press guarantees when confronted with even an alleged possibility of damage to a defendant—despite all the protective devices we have shown to be at the disposal of the court in ensuring that defendant a fair trial.

Surely it is self-evident that if this Court were ever to approve the type of prior restraint under review, several developments would immediately occur. First, defense attorneys would begin seeking prior restraint orders as a matter of course, both in order to screen their clients from any publicity at all and in order to protect themselves from a charge of ineffective assistance of counsel. Secondly, prosecutors would virtually never oppose such requests, since publicity would not necessarily help their cases and it would be far safer for them to concur in such requests than to risk later reversals on grounds of prejudicial publicity. And finally the lower courts, faced with no opposition from the immediate parties, could easily discern some "evidence" of possible prejudice to the defendant—as demonstrated by this case—and would begin routinely issuing prior restraint orders and their blood relatives, orders closing courts.

If this Court were to attempt to articulate *any* type of standard whereby confessions and other types of information about pending cases could be suppressed, the varying interpretations and applications of that standard in the flood of prior restraint orders that would follow obviously would result in a concomitant flood of cases attacking those orders.[18] Appellate re-

[18] The complexity of these orders—even relatively brief ones—is illustrated by the County Court's order in this case. If that order had remained in effect, and Simants were to serve a life sentence,

view must be immediate, or the right is lost before the judicial error can be remedied—and there is authority to the effect that the press must obey even the most outrageously unconstitutional order until it is reversed on appeal. *United States* v. *Dickinson, supra.* (The assumption in that case being, however, that such an appeal would be immediately provided.) Suppose appellate courts would not or could not act immediately—just as the Nebraska Supreme Court refused to act expeditiously in this case. Is this Court prepared to give federal District Courts the power to step in and void illegal state orders? And as to both state and federal orders, we question the wisdom or even the possibility of this Court itself undertaking the task of invalidating a series of improper prior restraint orders.

Thus, if this Court approves the type of order under review, one of the most unique, honored and vital aspects of the American system—the right of the press rather than Government to decide what news the American people will receive—would have disappeared. And ironically, it will have disappeared just at that moment in history when events not only in this country but throughout the world are demonstrating that the First Amendment should be strengthened—for the protection of us all—rather than eroded away.

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a copy of the preliminary hearing would never be made public until his death. The court ruled that a copy of the preliminary hearing would be made available to the public "at the expiration of this order" (Cert A 3a), and the order was to remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." *Id.*

Respectfully submitted,

E. Barrett Prettyman, Jr.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

James L. Koley
Stephen T. McGill
McGill, Koley & Parsonage, P.C.
Suite 300
10010 Regency Circle
Omaha, Nebraska 68114

Attorneys for Petitioners